

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Marcus Cable Associates, LLC d/b/a)	
Charter Communications, Inc.)	
)	CSR 5927-E
Petition for Determination of Effective)	
Competition in Denton, TX (TX0580))	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 5, 2002

Released: September 6, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Marcus Cable Associates, LLC d/b/a Charter Communications, Inc. ("Charter") has filed with the Commission a petition alleging that Charter is subject to effective competition from competing service providers in Denton, Texas ("Denton"). Charter alleges that its cable system serving Denton is subject to effective competition, pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act"),¹ and Sections 76.7(a)(1) and 76.905(b)(2) of the Commission's rules, and seeks revocation of the certification of the local franchising authority in Denton to regulate basic service rates.² Charter bases its allegation of effective competition on the competing services provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and EchoStar Communications Corporation ("EchoStar"), and a SMATV operator, TVMAX, Inc. Denton filed an opposition, to which Charter filed a reply.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 76.905 of the Commission's rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. Based on the record

¹47 U.S.C. § 543.

²47 C.F.R. § 76.905(b)(2).

³47 C.F.R. § 76.906.

⁴47 C.F.R. § 76.905.

in this proceeding, Charter has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁵

4. Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint,⁶ and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available through national, regional or local media.⁷ Charter has provided evidence of the advertising of DBS service in news media serving the franchise area.⁸ Denton challenges the validity of this advertising since it does not reflect the availability of local broadcast stations through DBS service in Denton.⁹ While the Commission's program comparability criterion requires that competitors offer more than 12 channels of video programming, including more than one non-broadcast channel, this standard does not contain a local broadcast programming requirement.¹⁰ As a result, we find that the advertising documentation provided by Charter demonstrates that potential subscribers in Denton are reasonably aware of the MVPD services offered by the DBS providers. We also find that the DBS providers' programming meets the program comparability standard for effective competition purposes.¹¹

5. Charter has demonstrated that Denton is served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Charter has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in Denton, that there exists no regulatory, technical, or other impediments to households within Denton taking the services of the DBS providers, and that potential subscribers in Denton have been made reasonably aware of the MVPD services of DirecTV and EchoStar.¹² Therefore, the first prong of the competing provider test is satisfied.

⁵ 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁶ *See Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd 4545, 4554 n.52 (1991) ("Rate Order"); *Time Warner Entertainment-Advanced/Newhouse Partnership*, 12 FCC Rcd 13801, 13806 (1997) ("TWE-AN").

⁷ *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5631, 5660-61 (1993).

⁸ Petition at 3 and Exhibit 1.

⁹ Opposition at 2. Denton also argues that the advertising provided by Charter does not demonstrate the continued offering of DBS service by DIRECTV in Denton since certain promotional offers reflected in the advertising have expired. *Id.* The expiration of a limited time promotional discount does not connote the termination of service. As indicated above, DBS service is presumed by the Commission to be technically available nationwide. *Rate Order*, 6 FCC Rcd at 4554 n.52; *TWE-AN*, 12 FCC Rcd at 13806.

¹⁰ *See* 47 C.F.R. § 76.905(g).

¹¹ *See* Petition at 3-4 and Exhibits 2-3. Exhibit 2 contains the channel lineup for Charter's cable system serving Denton and Exhibit 3 includes nationwide channel lineups of DirecTV and EchoStar.

¹² *Id.* at 2-4.

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Charter has obtained subscriber numbers from TVMAX, Inc., a SMATV operator in Denton.¹³ Charter also purchased a report from SkyTrends that identified the number of subscribers attributable to the DBS providers in Denton on a franchise-specific zip code plus four basis.¹⁴ Denton disputes the validity of SkyTrends' data as inaccurate and out of date.¹⁵ We reject the criticisms leveled by Denton.¹⁶ Charter has demonstrated that the zip code plus four subscriber data it received from SkyTrends for Denton was specific to Charter's franchise area.¹⁷ We also believe that the relatively short (less than 2 month) delay between Charter's receipt of the SkyTrends data and the filing of its Petition do not invalidate its competitive penetration showing.

7. Turning to the competitive penetration levels in Denton, Charter asserts that it is the largest MVPD in Denton because Charter's subscribership exceeds both the SMATV and the aggregate DBS subscribership for that community.¹⁸ Based upon the combined levels of DBS and SMATV subscriber penetration (19.6%), calculated using Census 2000 household data,¹⁹ we find that Charter has

¹³ *Id.* at 5 and Exhibit 6. Denton questions the timeliness of the March 2002 TVMAX subscriber data obtained by Charter. Opposition at 5. Absent specific information suggesting a significant change in TVMAX subscribership from March to the time Charter filed its Petition in June 2002, we find no reason to reject the information submitted by Charter in this instance.

¹⁴ Petition at 4-5 and Exhibit 5. The zip code plus four report obtained by Charter differs from the five digit zip code tracking reports referenced by Denton in its Opposition. Opposition at Exhibit 4. While SkyTrends offers monthly DBS subscriber reports on a five digit zip code basis, it will also perform a more targeted zip code plus four analysis upon special request. This analysis allocates DBS subscribers to a franchise area using zip code plus four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information. Petition at 4-5; Reply at 6-7.

¹⁵ Opposition at 3-6. Specifically, Denton argues that the SkyTrends data potentially contains Post Office Box accounts and includes other accounts for customers who live outside Denton. *Id.* at 3. Denton also criticizes the timeliness of the data, which was current as of April 30, 2002, at the time Charter filed its Petition in June 2002. *Id.* at 5.

¹⁶ Denton faults Charter and SkyTrends for failing to provide Denton with an opportunity to verify the SkyTrends data. Reply at 3-5. Pursuant to Section 76.907(c) of the Commission's rules, cable operators may request subscriber information from competitors for effective competition purposes. *See* 47 C.F.R. § 76.907(c). This subscriber information may be limited to numerical totals. *Id.* The Commission has accepted DBS subscriber reports from SkyTrends on behalf of the DBS providers in satisfaction of this requirement. *See, e.g., Mountain Cable Company d/b/a Adelphia Cable Communications*, 14 FCC Rcd 13994, 13997 n.26 (1999). Under Section 76.7(a)(3) of the Commission's rules, Charter sent a service copy of its Petition, including the subscriber report it received from SkyTrends, to Denton. *See* 47 C.F.R. § 76.7(a)(3). Under the circumstances of the instant case, we believe that Charter has satisfied its obligations under the Commission's rules regarding the provision of subscriber information for effective competition purposes.

¹⁷ Reply at 6-7 and Exhibit 1 (letter from SkyTrends explaining zip code plus four allocation process and elimination of Post Office Box accounts).

¹⁸ Petition at 4 and Exhibits 4-6.

¹⁹ *Id.* at 5 and Exhibit 7 (5,919 DBS subscribers + 121 SMATV subscribers ÷ 30,895 Denton 2000 Census households = 19.6%). In opposition, Denton asserts that 2002 household estimates are available from the North Central Texas Council of Governments ("NCTCOG"). Opposition at 3 and Exhibit 1. The NCTCOG data submitted by Denton reflects estimates for housing units, not households. Opposition at Exhibit 1. The Commission has stated that, for effective competition purposes, the term "households" has the same meaning as that

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demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in each of these Communities. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable system Denton is subject to effective competition.

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Marcus Cable Associates, LLC d/b/a Charter Communications, Inc. **IS GRANTED**.

9. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service in Denton, TX **IS REVOKED**.

10. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²⁰

FEDERAL COMMUNICATIONS COMMISSION

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used by the U.S. Census Bureau. *See, e.g., Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 9 FCC Rcd 4316, 4324 (1994). The U.S. Census Bureau defines households as “[a] person or group of persons who live in a housing unit” or “occupied housing units.” *See* <www.census.gov/dmd/www/glossary.html>. In contrast, housing units include locations that, “if vacant, [are] intended for occupancy as a separate living quarters.” *Id.* We therefore accept the 2000 Census household data provided by Charter rather than the housing unit estimates submitted by Denton. Moreover, we note that the competitive penetration levels in Denton would still exceed 15% using the NCTCOG data provided by Denton that includes both households and vacant housing units. *See* Reply at 6.

²⁰ 47 C.F.R. §0.283.